

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO**

JENNIFER L. MILLER, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	
)	
MICHAEL J. ANDERSON, <i>et al.</i> ,)	Judge John R. Adams
)	
Defendants,)	Case No. 5:20-cv-01743-JRA
)	
and)	
)	
FIRSTENERGY CORP.,)	
)	
Nominal Defendant.)	

DEFENDANTS’ OBJECTION TO APPOINTMENT OF LEAD COUNSEL

Pursuant to this Court’s order (Doc. 352), Defendants submit this objection to the appointment of Markovits, Stock & DeMarco, LLC and Abraham, Fruchter & Twersky LLP (together, “Markovits/Abraham”) as lead counsel in this matter.

Defendants join in the points made by the SLC (Doc. 356) and by Plaintiffs (Doc. 355), and make the following additional points.

No justiciable controversy; no jurisdiction. To start, there is no case or controversy here and therefore no Article III jurisdiction. By virtue of the final judgment entered in the Southern District action, this action is barred by res judicata and all settled claims in this action have become moot. (*See* Doc. 353 (parties’ joint motion to dismiss with prejudice); 353-1 (order of final settlement approval; 353-2 (final judgment approving settlement and order of dismissal).) There is nothing for the Court to do other than dismiss this action. The Court lacks the power to take any other action, such as appointing lead counsel, where there is no justiciable controversy. *See, e.g., Pettrey v. Enter. Title Agency, Inc.*, 584 F.3d 701, 702 (6th Cir. 2009) (“Given that the

plaintiffs have settled and released all of their claims against the defendants, this case is moot. Therefore, this appeal must be dismissed for lack of jurisdiction because there is no justiciable case or controversy under Article III of the Constitution.”).

Undue delay. Markovits/Abraham have unduly delayed in seeking appointment as lead counsel in this matter. Markovits/Abraham moved to intervene in this action on behalf of stockholder Leslie Katz in October 2020—nearly two years ago. (Doc. 22.) That motion was denied in September 2021—nearly one year ago. (Doc. 117.) Markovits/Abraham took no further action at that time. In the meantime, on behalf of another stockholder, Todd Augenbaum (the would-be proposed intervenor here), Abraham submitted a pre-suit demand to the FirstEnergy board of directors in April 2021—one-and-a-half years ago.

Eight months ago, the parties publicly disclosed they had agreed to mediate these actions on February 1, 2022. (*E.g.*, Doc. 221; *see also, e.g.*, Doc. 265 (reporting occurrence of mediation).) Markovits/Abraham didn’t try to get involved then. Over six months ago, the parties filed a joint motion to stay in light of the agreement in principle for a global settlement of all the derivative actions, including this one. (Doc. 273.) Again, Markovits/Abraham took no action at that time.

On August 15, 2022, the Court ordered Markovits/Abraham to file a motion to intervene “as soon as practicable.” (Doc. 345.) Not until ten days later did Markovits/Abraham file that motion. (Defendants will oppose that motion by September 8, 2022, in accordance with Local Rule 7.1(d).)

In short, in the months and years since Markovits/Abraham have filed motions or otherwise sought to inject themselves in the proceedings here—whether on behalf of Augenbaum

or another FirstEnergy stockholder—they have never, in all that time, sought to be appointed lead counsel. Any attempt to do so now is far too late.

Undue prejudice. Relatedly, appointing Markovits/Abraham as lead counsel now would be unduly prejudicial to Defendants. The Southern District of Ohio has granted final approval of the global settlement and has entered a final judgment. That judgment precludes this action under hornbook principles of *res judicata*, and the releases in the settlement likewise bar the settled claims here. Markovits/Abraham have conceded this. *See Emps. Ret. Sys. of the City of St. Louis, et al. v. Jones, et al.*, No. 2:20-cv-04813 (S.D. Ohio), Doc. 181 at 13 (“If approved, [the settlement] would resolve not only every claim that would be barred by *res judicata* if this case proceeded to judgment, but also a panoply of other rights that are tangential to the Complaint.”).

Comity and practical considerations. Moreover, appointing them as lead counsel here—or taking any action other than dismissing the case—would “frustrate the comity doctrine,” inasmuch as it would “requir[e] two federal district courts and the parties to expend resources to resolve substantially similar claims and issues.” *In re Google Inc.*, 588 F. App’x 988, 991-92 (Fed. Cir. 2014) (granting mandamus relief).

In addition, the Southern District has ordered that “FirstEnergy stockholders[] and anyone acting or purporting to act on behalf of FirstEnergy” are “forever barred and enjoined from commencing, instituting, or prosecuting any action or proceeding in any court, tribunal, or forum asserting” the claims that are the subject of the settlement (Doc. 353-2, ¶ 23), meaning that litigation activity undertaken by Markovits/Abraham as lead counsel would be in violation of that injunction.

Nor would appointment serve any practical purpose, even if there were a legal basis to appoint Markovits/Abraham as lead counsel (and there is not). Appointing new counsel to carry on with this mooted action to no end would unnecessarily burden the parties and waste their resources—including the resources of FirstEnergy, the putative beneficiary of this case. Likewise, appointing Markovits/Abraham to litigate this action would squander scarce judicial resources and taxpayer dollars. In short, there is nothing to be gained by appointing Markovits/Abraham as lead counsel and much to be wasted.

* * *

For the reasons set forth in the submissions by the SLC and Plaintiffs, as well as those stated above, Defendants submit that the Court should not appoint Markovits/Abraham as lead counsel in this matter.

Dated: August 26, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically on August 26, 2022. Notice of this filing will be sent to all electronically registered parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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